2004

Gregory K. Chase v. Jordan School District : Brief of Appellee

Utah Court of Appeals

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D. Bruce Oliver; D. Bruce Oliver, L.L.C.; Attorney for Appellant .

IN THE UTAH COURT OF APPEALS

GREGORY K. CHASE, an individual,	:	
Plaintiff and Appellant,	:	
v.	:	Case No. 20040575-CA
JORDAN SCHOOL DISTRICT, a political subdivision of the State of Utah, and JOHN DOES I-V, individuals,	:	
Defendants and Appellees.	:	

BRIEF OF DEFENDANT - APPELLEE JORDAN SCHOOL DISTRICT

Appeal from Orders granting summary judgment and denying a motion to amend complaint of the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Tyrone E. Medley presiding

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED BY DEFENDANT - APPELLEE

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LIST OF ALL PARTIES

To the best of Defendant Jordan School District's knowledge, all parties to the proceeding appear in the caption of this Brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATUTES, RULES & CONSTITUTIONAL PROVISIONS

IN THE UTAH COURT OF APPEALS

GREGORY K. CHASE, an individual,	:	
Plaintiff and Appellant,	:	
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STATEMENT OF JURISDICTION

This matter comes within the appellate jurisdiction of the Utah Supreme Court under Utah Code Ann. § 78-2-2(3)(j) (2002). On July 12, 2004, the matter was transferred to this Court by the Utah Supreme Court pursuant to Utah Code Ann. §§ 78-2-2(4) and 78-2a-3(2)(j) (2002). R. 361.

STATEMENT OF THE ISSUES

1. The district court lacked jurisdiction over Chase's 42 U.S.C. § 1983 claim because the claim is barred by Eleventh Amendment immunity. Chase stipulates in his opening brief that Eleventh Amendment immunity would apply to his § 1983 claim in federal court. Brief of Appellant at 26. If the claim would have been barred in federal court by the Eleventh Amendment, it is likewise barred in state court. Alden v. Maine,

527 U.S. 706, 753-54 (1999). Morever, under Utah case law, school districts are considered instrumentalities of the state for immunity purposes, and are therefore absolutely immune from suit in state courts. Campbell v. Pack, 389 P.2d 464, 465 (1964).

This issue was not raised before the district court, but is raised for the first time on appeal.

STANDARD OF REVIEW: A lack of subject matter jurisdiction can be raised at any time by either party or by the court. Weiser v. Union Pacific R.R. Co., 932 P.2d 596, 597 (Utah 1997). Although this issue was not raised in the district court, this Court can affirm the decision of the district court on this alternative ground. Buehner Block Co. v. UWC Assocs., 752 P.2d 892, 894-95 (Utah 1988); State v. South, 924 P.2d 354, 355 n.3 (Utah 1996).

2. The district court correctly granted summary judgment on Chase's 42 U.S.C. § 1983 claim, because Chase's defamation claim was insufficient to establish a claim for deprivation of a liberty interest in that he resigned and the alleged defamation was therefore not made in the course of termination of Chase's employment. Siegert v. Gilley, 500 U.S. 226 (1991); Stidham v. Peace Officer Standards & Training, 265 F.3d 1144 (10th Cir. 2001).

This issue was raised by Jordan School District in its memorandum in support of its motion for summary judgment. R. 53-56. The district court granted Jordan School District's motion for summary judgment based in part on this issue. R. 354-55.

STANDARD OF REVIEW: "Summary judgment is appropriate if, viewing the evidence in a light most favorable to the nonmoving party, the moving party is nevertheless entitled to a judgment as a matter of law." Warren v. Provo City Corp., 838 P.2d 1125, 1128 (1992). "Because the determination of whether summary judgment is appropriate presents a question of law, we accord no deference to the trial court's decision and instead review it for correctness." DOIT, Inc. v. Touche, Ross & Co., 926 P.2d 835, 841 (Utah 1996).

3. The district court exercised sound discretion in denying Chase's motion to amend the complaint to name an additional party because Chase's motion was untimely and adding an additional party to the 42 U.S.C. § 1983 claim would have been futile. Chase's motion was untimely because it was filed six months after the stipulated deadline to add parties, eight months after Chase learned of the potential involvement of the party he sought to add, and after the court had issued its memorandum decision indicating it would grant summary judgment for Jordan School District. Any § 1983 defamation claim against the additional party would have been futile because Chase's resignation prevents him from establishing a claim for deprivation of a liberty interest. Stidham, 265 F.3d 1144.

This issue was raised by Jordan School District in its memorandum in opposition to Chase's motion to amend. R. 308-11, 313-15. The district court denied Chase's motion based on "all" of the arguments in Jordan School District's memorandum. R. 348.

STANDARD OF REVIEW: A district court's denial of a motion to amend a complaint will not be disturbed absent an abuse of discretion resulting in prejudice. Jones v. Salt Lake City Corp., 2003 UT App 355, ¶7, 78 P.3d 988.

4. Chase appeals only the dismissal of his 42 U.S.C. § 1983 claim, and the district court's denial of his motion to amend the complaint. Brief of Appellant at 16. Chase has therefore waived appellate review of any other issues by failure to raise them in his opening brief.

This issue was not raised before the district court, but is raised for the first time on appeal.

STANDARD OF REVIEW: Generally, any issues "that were not presented in the opening brief are considered waived and will not be considered by the appellate court." Brown v. Glover, 2000 UT 89, ¶23, 16 P.3d 540.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES & RULES

> U.S. Const. amend. XI **[Suits against states]**
> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.
>
> 42 U.S.C. § 1983 **Civil action for deprivation of rights**
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial

officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Utah R. Civ. P 15. **AMENDED AND SUPPLEMENTAL PLEADINGS**
(a) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

STATEMENT OF THE CASE

This case involves a claim against Jordan School District by a former employee for defamation that allegedly occurred after the employee's resignation from Jordan School District. R. 3-4, 10-17. On June 6, 2003, Gregory Chase brought this action against Jordan School District and John Does I-V. R. 1-28. Chase sought recovery under 42 U.S.C. § 1983 and several state law claims. R. 10–17.

Jordan School District filed a motion for summary judgment on January 4, 2004. R. 45-62. On May 20, 2004, Chase filed a motion to amend the complaint to substitute a specific individual, Clyde Shaw, for John Doe I. R. 251-304.

On June 18, 2004, the district court entered a minute order denying Chase's motion to amend and stating that the minute order would constitute the order of the court

resolving the issue. R. 348-49. The district court entered the formal order granting summary judgment on July 1, 2004. R. 351-58. Chase filed his notice of appeal on July 2, 2004. R. 359.

STATEMENT OF RELEVANT FACTS

Appellant Chase was an employee of Jordan School District's police department when he voluntarily resigned in approximately April of 2002. R. 3, ¶8. In June of 2002, Chase applied for a position with Midvale City Police Department, and was given an interview. R. 3, ¶9. Sometime after his resignation from Jordan School District but before his interview with Midvale City, an allegedly defamatory statement was made to Midvale City about Chase. R. 3, ¶10. Whether an employee of Jordan School District did in fact make a defamatory statement or whether his statement was misconstrued and perpetuated by another party is not clear. However, for purposes of summary judgment, the district court accepted that a defamatory statement was made. R. 352, ¶2.iv. Chase was subsequently denied employment by Midvale City. R. 4-5, ¶13.

Chase brought the present action against Jordan School District on June 6, 2003. R. 1-28. By stipulation of the parties, the deadline for Chase to add additional parties was November 3, 2003. R. 38, ¶4.c. Also, by stipulation of the parties, the discovery deadline was April 16, 2004. R. 37, ¶3.a. On October 29, 2003, in the course of a deposition, Chase became aware of the identity of a specific person, Clyde Shaw, who may have made allegedly defamatory remarks about Chase while Shaw was chief of police of

Jordan School District's police department. R. 274, ¶6. Also on October 29, 2003, Chase became aware that Dan Pearson was a potential witness of the allegedly defamatory remarks. R. 274, ¶7. Chase did not depose Pearson until April 15, 2004. R. 296.

SUMMARY OF ARGUMENT

Chase appeals only the dismissal of his § 1983 claim and the denial of his motion to amend the complaint. The district court's dismissal of all other claims is not before the court, as those issues have been waived by Chase's failure to address them in his opening brief.

Chase's § 1983 claim was properly dismissed because the claim is barred by Eleventh Amendment immunity, depriving the district court of jurisdiction to hear it. Chase stipulates in his opening brief that the Eleventh Amendment would jurisdictionally bar his § 1983 action in federal court. Under well-established federal law, if the Eleventh Amendment bars an action in federal court, then the action is similarly barred in state court. Accordingly, the district court lacked jurisdiction to hear Chase's § 1983 claim. Further, Utah case law provides that school districts are arms of the state. As arms of the state, school districts are not "persons" subject to suit under § 1983. Although the district court did not dismiss Chase's § 1983 claim on jurisdictional grounds, the issue may appropriately be raised for the first time on appeal and this Court may affirm the dismissal on alternate grounds.

Chase's § 1983 claim was also properly dismissed because his resignation prevents him from establishing a claim for deprivation of a liberty interest. Chase resigned, so any allegedly defamatory statements made after his resignation were not made in the course of his termination from employment, as required by the four-part liberty interest test. Chase's opening brief mistakenly relies on a now-disavowed test which has subsequently been clarified such that Chase's resignation is the dispositive fact in precluding a liberty interest claim. Because the district court applied correct law in dismissing the § 1983 claim, summary judgment should be affirmed.

The district court did not abuse its discretion in denying Chase's motion to amend the complaint to name an additional party, because Chase's motion was untimely and adding an additional party to the 42 U.S.C. § 1983 claim would have been futile. Chase's motion was untimely because it was filed several months after Chase learned the identity of the party he sought to add and after the court had issued its decision granting summary judgment to the only defendant. Any § 1983 claim against the additional party would have been futile because, under controlling federal case law, Chase's resignation prevents him from establishing a claim for deprivation of a liberty interest.[1]

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[1]Chase states in his opening brief: "In this appeal, Plaintiff appeals his § 1983 defamation – damage to reputation claim only, being that the issue should be dispositive in his favor." Brief of Appellant at 16 (emphasis added). Generally, any issues "that were not presented in the opening brief are considered waived and will not be considered by the appellate court." Brown v. Glover, 2000 UT 89, ¶23, 16 P.3d 540. Accordingly, this brief does not address any issues which were not presented in the opening brief.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION OVER THE 42 U.S.C. § 1983 CLAIM DUE TO ELEVENTH AMENDMENT IMMUNITY

A lack of subject matter jurisdiction can be raised at any time by either party or by the court. Weiser v. Union Pacific R.R. Co., 932 P.2d 596, 597 (Utah 1997). Although this issue was not raised in the district court, this Court can affirm the decision of the district court on this alternative ground. Buehner Block Co. v. UWC Assocs., 752 P.2d 892, 894-95 (Utah 1988); State v. South, 924 P.2d 354, 355 n.3 (Utah 1996).

The district court lacked jurisdiction over Chase's 42 U.S.C. § 1983 claim, because the claim is barred by Eleventh Amendment immunity. Chase stipulates to the following statement of law in his opening brief: "In federal court, the § 1983 liability could have been avoided under the Eleventh Amendment to the U.S. Constitution." Brief of Appellant at 26.

If the claim would have been barred in federal court by the Eleventh Amendment, as conceded by Chase, then the claim is likewise barred in state court. Alden v. Maine, 527 U.S. 706, 753-54 (1999). In Alden, the United States Supreme Court examined the issue of state sovereign immunity as applied to the Fair Labor Standards Acts (FLSA). Id. at 711. State employees in Maine had brought an action in federal court against the state of Maine for alleged violations of overtime provisions in FLSA. Id. While the action was pending, the U.S. Supreme Court issued a decision in another case holding

that Congress lacked power to abrogate the states' sovereign immunity in federal court. Id. at 712 (citing Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)). Based on the Supreme Court's newly rendered decision, the state employees' FLSA action was dismissed by the federal district court, and the dismissal was affirmed by the First Circuit. Id. (citing Mills v. Maine, 118 F.3d 37 (1st Cir. 1997)). The state employees then filed the same action in state court. Id. The action was dismissed at the trial level on sovereign immunity grounds, and the dismissal was affirmed by the Maine Supreme Judicial Court. Id. The dismissal was subsequently affirmed in Alden by the U.S. Supreme Court. Id.

The Court in Alden noted that the phrase "Eleventh Amendment immunity" "is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." Id. at 713. Rather, immunity from suit is a fundamental aspect of State sovereignty itself:

> [A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratifications of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional amendments.

Id. Ultimately, in affirming that the federal FLSA claim was appropriately dismissed from state court on immunity grounds, the Court stated that "[w]e are aware of no constitutional precept that would admit of a congressional power to require state courts to

entertain federal suits which are not within the judicial power of the United States and could not be heard in federal courts." Id. at 754.

Here, Chase concedes in his opening brief that this matter could not be heard in federal court under Eleventh Amendment immunity. Accordingly, as Alden holds, since the matter cannot be brought against the state in federal court, it likewise cannot be brought against the state in its own courts.

The district court additionally lacked jurisdiction over this case, aside from Chase's concession in his opening brief, because governing Utah case law holds that school districts are immune from suit in state court. Under Utah case law, school districts are considered instrumentalities of the state for immunity purposes, and are therefore absolutely immune from suit in state courts. Campbell v. Pack, 389 P.2d 464, 465 (Utah 1964) (citing Bingham v. Board of Educ., 223 P.2d 432 (1950)); Woodcock v. Board of Educ., 187 P. 181 (Utah 1920)). "[S]chool districts are instrumentalities of the state acting in its behalf in educating children and as such partake of its sovereign immunity." Campbell, 389 P.2d at 465. Campbell has never been reversed by the Utah Supreme Court and is still controlling precedent over Utah's courts for the proposition that a school district, such as Jordan School District, is an agency or arm of the state.

An agency or arm of the state cannot be sued as a "person" under § 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). In Will, the Supreme Court expressly held that "neither a State nor its officials acting in their official capacities are

'persons' under § 1983." Id. The Utah Supreme Court, following Will, also concluded that § 1983 claims in state courts cannot be brought against state agencies because the agencies are not "persons" under the statute. Ambus v. Utah State Bd. of Educ., 858 P.2d 1372, 1376-77 (Utah 1993). Because Jordan School District is an agency or arm of the state under Campbell, which is controlling Utah precedent, Jordan School District is therefore not a "person" subject to suit under § 1983 in state courts, and was correctly dismissed from the action.

At first blush, there may appear to be a conflict between the Tenth Circuit and the Utah Supreme Court on this issue. The Tenth disregarded the Utah Supreme Court's definitive interpretation of state law, from Campbell and its predecessors, when it concluded in Ambus v. Granite Bd. of Educ., 995 F.2d 992 (10th Cir. 1993), that school districts are not arms of the state for Eleventh Amendment immunity purposes under § 1983 actions brought in federal court. The Tenth Circuit held that Utah's school districts are "not entitled to immunity from § 1983 suits in federal court." Id. at 997 (emphasis added). In so ruling, the Tenth Circuit reversed its prior decision in Harris v. Tooele County Sch. Dist., 471 F.2d 218, 220 (10th Cir. 1973), which had favorably cited Campbell for the proposition that school districts are arms of the state under state law. However, there is no direct conflict between the Utah Supreme Court and the Tenth Circuit because the Tenth Circuit limited its holding to § 1983 suits filed in federal court. Morever, even if a direct conflict existed, Utah's courts are equally empowered to decide

questions of federal law as lower federal appellate courts. See Hagen v. Utah, 510 U.S. 399, 409 (1994) (stating that certiorari was granted "to resolve the direct conflict" between the Tenth Circuit and the Utah Supreme Court on an issue of federal law).[2]

II. CHASE'S 42 U.S.C. § 1983 CLAIM FAILS BECAUSE HIS RESIGNATION PRECLUDES HIM FROM ESTABLISHING A DEPRIVATION OF A LIBERTY INTEREST

Utah appellate courts have held that "[s]ummary judgment is appropriate if, viewing the evidence in a light most favorable to the nonmoving party, the moving party is nevertheless entitled to a judgment as a matter of law." Warren v. Provo City Corp., 838 P.2d 1125, 1128 (Utah 1992). Because summary judgment involves a question of law, "we accord no deference to the trial court's decision and instead review it for correctness." DOIT, Inc. v. Touche, Ross & Co., 926 P.2d 835, 841 (Utah 1996).

The district court correctly granted summary judgment because, as a matter of law, Chase's § 1983 claim was insufficient to establish a claim for deprivation of a liberty interest in that he resigned and the alleged defamatory statement was not made in the

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[2]Hagen concerned the issue of whether an Indian Reservation had been diminished by Congress such that Utah could properly exercise state jurisdiction over a crime committed by Hagen on the Reservation. 510 U.S. at 409. The Utah Supreme Court, relying on its precedent that the Reservation had been diminished, affirmed Hagen's conviction, holding that state jurisdiction was validly asserted. Id. at 408. The Tenth Circuit had previously held that the Reservation was not diminished. Id. The Utah Supreme Court's decision was thus in direct conflict with the prior Tenth Circuit decision. The U.S. Supreme Court held that the Reservation was diminished and affirmed the decision of the Utah Supreme Court. Id. at 421.

course of terminating Chase's employment. Siegert v. Gilley, 500 U.S. 226 (1991); Paul v. Davis, 424 U.S. 693, 708-09 (1976); Stidham v. Peace Officer Standards & Training, 265 F.3d 1144 (10th Cir. 2001).

In Paul, an individual brought a § 1983 action against police chiefs for distributing an allegedly defamatory flyer identifying the individual as an active shoplifter. 424 U.S. at 695. The U.S. Supreme Court held that injury to reputation by itself is not a liberty interest protected under the Fourteenth Amendment, and is therefore not actionable under § 1983. Id. at 708-09.

In Siegert, a former governmental employee brought a § 1983 claim against his former supervisor, alleging that a defamatory letter written by the former supervisor had deprived him of a liberty interest because it rendered him unable to obtain other appropriate employment in his field. Siegert, 500 U.S. at 229. The employee had previously resigned from his employment, and the supervisor wrote the letter after the resignation. Id. at 228. The Court held that the employee had failed to establish a violation of any constitutional right, because injury to reputation by itself is not a liberty interest protected under the Fourteenth Amendment. Id. at 233 (citing Paul). The Court instead stated that the alleged defamation must be incident to the termination to be actionable under § 1983: "The alleged defamation was not uttered incident to the termination of [the employee's] employment by the hospital, since he voluntarily resigned from his position at the hospital, and the letter was written several weeks later." Id. at

234. Accordingly, the Court upheld dismissal of the employee's claims under qualified immunity grounds, because he had failed to allege deprivation of a liberty interest. Likewise, in the present case, Chase resigned from Jordan School District and the alleged defamation happened "sometime after his resignation." R. 3, ¶10. Therefore, any alleged defamation is not incident to the termination of Chase's employment and fails to constitute a liberty interest actionable under § 1983.

In Stidham, a Tenth Circuit case, a police officer resigned from his position and sought employment elsewhere. 265 F.3d at 1149, 1154. Unable to obtain subsequent employment, the officer brought a § 1983 action against Peace Officer Standards and Training Division ("POST"), the state agency empowered to regulate the certification of peace officers, alleging that POST had provided false information about him to potential employers which foreclosed other employment opportunities. Id. 1149. The Tenth Circuit noted that it had previously held in Workman v. Jordan, 32 F.3d 475 (10th Cir. 1994), that the third prong of its four-part liberty interest test required that the allegedly defamatory statements "must occur in the course of terminating the employee or must foreclose other employment opportunities." Stidham, 265 F.3d at 1153 (emphasis in original). Based on Siegert, the Tenth Circuit disavowed the "foreclose other employment opportunities" language in Workman, and clarified that the allegedly defamatory statements must be made in the course of terminating the employee to be

actionable under § 1983.[3] Stidham, at 1154. Because the police officer had resigned and then sought employment elsewhere, the allegedly defamatory statements were not made in the course of terminating employment, and were therefore not actionable under § 1983. Id.

Chase argues to this Court that his case is distinguishable from both Siegert and Stidham in that the plaintiffs in those cases resigned under the threat of termination, while he resigned in good standing. Brief of Appellant at 23. However, Stidham did not involve a resignation under threat of termination. There, the police officer resigned because he did not want to change his residence to conform to a new county policy that its peace officers reside within the county limits. Stidham, 265 F.3d at 1149. Siegert did involve a resignation under threat of termination, and because it did, it stands for the proposition that resignation precludes a liberty interest claim even if the resignation came under threat of termination. In any event, nothing in the language of either case suggests that the threat of termination or any other reason for resignation is relevant, only that the fact of resignation itself is. Chase cites to no specific language in either case to support his argument.[4]

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[3]The Tenth Circuit similarly clarified the Workman language a year earlier in Renaud v. Wyoming Dep't of Family Servs., 203 F.3d 723, 728 n.1 (2000), noting that a deprivation of a liberty interest does not include "any defamatory statement that might foreclose future employment opportunities," but only defamation occurring "in the course of the termination of employment." (Emphasis added.)

[4]Chase inexplicably argues to this Court that Jordan School District is strictly liable for damage to Chase's reputation under Utah Code Ann. § 78-12-28 (2002). Brief

III. CHASE'S MOTION TO AMEND WAS PROPERLY DENIED BECAUSE IT WAS UNTIMELY AND FUTILE

A district court's denial of a motion to amend a complaint will not be disturbed absent an abuse of discretion resulting in prejudice. Jones v. Salt Lake City Corp., 2003 UT App 355, ¶7, 78 P.3d 988. Rule 15(a) of Utah Rules of Civil Procedure provides that leave to amend pleadings "shall be freely given when justice so requires." Rule 15 should be read "liberally so as to allow parties to have their claims fully adjudicated." Jones at ¶16 (citation and internal quotation marks omitted). "Factors to consider in deciding whether to allow amendment include whether the movant was aware of the facts underlying the proposed amendment long before its filing, the timeliness of the motion, the justification for delay, and any resulting prejudice to the responding party." Id. (citation and internal quotation marks omitted).

On appeal, Chase challenges the denial of his motion to amend only to the extent that he was not allowed to substitute Clyde Shaw, former chief of police for Jordan School District, on his § 1983 claim. Brief of Appellant at 16, 26-28. The district court denied Chase's motion to amend for "all" of the reasons set forth in Jordan School District's memorandum in opposition to the motion. R. 348. Those reasons included: the motion was untimely because it was brought after the court issued its minute order

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of Appellant at 25. The statute cited, however, offers no substantive right of action but is instead one of Utah's statutes of limitations. See section 78-12-1 (stating that "[c]ivil actions may be commenced only within the periods prescribed in this chapter").

stating it would grant summary judgment to Jordan School District (R. 308); the motion was untimely in that it was brought eight months after Chase first learned that Clyde Shaw may have made a defamatory statement about Chase (R. 311); the motion was untimely in that Chase could have pursued all of his discovery earlier to obtain information needed to add an additional party (R. 311); and the motion was futile in that the § 1983 claim could not prevail against an additional party because Chase's resignation precluded a liberty interest claim (R. 315).

Chase has failed to demonstrate why the district court's denial of the motion to amend constitutes an abuse of discretion. Chase did not adequately demonstrate to the district court why he did not pursue investigation and discovery earlier, particularly in deposing potential witnesses more promptly. Chase learned of Clyde Shaw's potential involvement back on October 29, 2003, in that he learned Shaw may have said something derogatory about him. R. 274, ¶6. However, Chase did not seek to add Shaw as a party until May 20, 2004. R. 251-52.[5] Also on October 29, 2003, Chase learned of Dan Pearson's involvement in the transmittal of the allegedly defamatory statement. R. 274, ¶7. But Chase did not depose Pearson until April 15, 2004. R. 296. In his argument to this Court, Chase does not explain why he failed to follow up with diligent investigation

[5]Although not relied upon by the district court, Chase's motion was also filed six months after the deadline to add additional parties, a deadline which Chase agreed to and which he never sought to extend. R. 38, ¶4.c.

or discovery as to Shaw or Pearson, or why he failed to generally pursue investigation of his claims with more diligence and promptness than he did.

Chase's opening brief does not even directly address the untimeliness of his motion to amend. He apparently acknowledges its untimeliness implicitly in his "unforeseen circumstances" argument regarding Jordan School District's purported withholding of information. Brief of Appellant at 27. Chase argues that Jordan School District's counsel interviewed Dan Pearson a year before Chase deposed Pearson, and that counsel was somehow at fault for not voluntarily disclosing his work product from that interview. Id. Yet, in his memorandum and affidavit in support of his motion to amend, Chase wholly failed to mention to the district court any investigative efforts made by him during this same time period, which was approximately one month before this action was filed. R. 268-77. Rather, Chase simply stated that at the time he filed this action, he did not know the identify of Shaw or Pearson or of the nature of their involvement. R. 268-69, ¶2, and 274, ¶4. This Court should reject Chase's unforeseen circumstances argument because it does not address or justify his failure to pursue investigation with reasonable diligence, particularly in interviewing or deposing witnesses sooner. See Brown v. Glover, 2000 UT 89, ¶30, 16 P.3d 540 (discussing attorney's responsibility to act with reasonable diligence and promptness and use available means of discovery to diligently represent client).

In addition, the district court correctly concluded that Chase's § 1983 claim against Clyde Shaw would have been futile because Chase's resignation precludes him from establishing a claim for deprivation of a liberty interest, as set forth in detail in the preceding argument. Stidham, 265 F.3d at 1154. Due to the futility of this claim, Chase cannot show that he was prejudiced when the district court denied his motion to add a party to his § 1983 claim. Given the entirety of the circumstances, including the futility of Chase's claim and the unexplained untimeliness of Chase's motion, the district court exercised sound discretion in denying the motion to amend.

CONCLUSION

For the reasons presented above, the trial court's decisions granting summary judgment to Jordan School District and denying Chase's motion to amend should be affirmed.

DEFENDANT JORDAN SCHOOL DISTRICT DOES NOT DESIRE ORAL ARGUMENT OR A PUBLISHED OPINION

Defendant-appellee Jordan School District does not request oral argument and a published opinion in this matter. The questions raised in this appeal are not such that oral

argument or a published opinion are necessary, though the defendant desires to participate in oral argument if such is held by the Court.

DATED this 9TH day of February, 2005.

J. CLIFFORD PETERSEN
Assistant Attorney General
Attorney for Defendant Jordan School District

CERTIFICATE OF MAILING

This is to certify that I mailed two copies of the foregoing BRIEF OF DEFENDANT - APPELLEE JORDAN SCHOOL DISTRICT to the following this 9th day of February, 2005:

D. Bruce Oliver
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